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The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MIKE MUSGRAVE, LUANN KELLY, and MARK MURPHY

Appeal 2009-005699
Application 10/827,185
Technology Center 1700

Before CHUNG K. PAK, CHARLES F. WARREN, and PETER F. KRATZ,
Administrative Patent Judges.

KRATZ, *Administrative Patent Judge.*

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

This is a decision on an appeal under 35 U.S.C. § 134 from the Examiner's final rejection of claims 1, 3-9, 11-18, 20-24, and 26-34. We have jurisdiction pursuant to 35 U.S.C. § 6(b).

Appellants' claimed invention is directed to a blend consisting essentially of polypropylene impact copolymer, an ethylene-containing random copolymer, and a clarifying agent in specified amounts, an article made with the blend, and methods of preparing the blend and the article.

Claim 1 is illustrative and reproduced below:

1. A blend consisting essentially of:

about 20 wt% to about 60 wt% of a polypropylene impact copolymer; about 300 to about 4000 ppm of a clarifying agent; and

a random copolymer, comprising from about 0.15 wt% to about 4.0 wt% ethylene, comprising a balance of said blend, wherein the blend, when formed into a resin and extruded into an about 22 mil thick sheet, has a Haze of less than about 77% and an Energy to Maximum Load/Energy After Maximum Load ratio of at least about 1.6 at about -29 °C.

The Examiner relies on the following prior art references as evidence in rejecting the appealed claims:

McCullough	6,015,854	Jan. 18, 2000
Su	7,078,463 B2	Jul. 18, 2006

Claims 1, 3-9, 11-18, 20-24, and 26-34 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Su in view of McCullough.

Appellants present basically the same arguments for all of the claims in arguing all of the rejected claims together as a group (App. Br. 12-15).

Accordingly, we select claim 1 as the representative claim on which we decide this appeal.

The principal issue before us is:

Have Appellants indicated error in the Examiner's determination that one of ordinary skill in the art would have been prompted to add a clarifying agent to the polymer blend taught by Su given the additional teachings of McCullough and, in so doing, arrived at a polymer blend as called for in representative claim 1?

We answer this question in the negative and we affirm the stated obviousness rejection for substantially the reasons set forth by the Examiner in the Answer. We add the following for emphasis.

Appellants argue that one of ordinary skill in the art would not have been prompted to add a clarifying agent, such as taught by McCullough, to the polymer film blend of Su because Su attains "minimal" haze values for the relatively thin films thereof without clarifying agent addition (App. Br. 13-14; Su, col. 4, l. 39 and Table 1). This argument is not persuasive of a lack of suggestion for clarifying agent addition to the polymer film blend of Sue for reason stated by the Examiner (Ans. 3-5).

In this regard, Su is concerned with a polymer blend used in making films for packaging foods, where it would be important that the film gave good optical properties and low haze values (Su, col. 2, ll. 27-41). Su employs up to 50 percent, by weight, of polypropylene impact polymer in the polymer blend used in making the core of the film and McCullough teaches that clarifying additives can be added to polypropylene impact copolymers to reduce haze in amounts corresponding to the representative claim 1 requirements (Su, col. 2, ll. 42-49; McCullough, col. 1, l. 40 – col. 3,

1. 4). While Su may be able to achieve minimally acceptable haze values without adding clarifying agents, it is manifest that further reduction of undesired haze would have been expected in Su with the addition of known clarifying agents as taught by McCullough to be useful for reducing haze in similar materials.

Appellants' additional argument that McCullough teaches away from the claimed subject matter based on a report of a portion of the Background Section of McCullough is not persuasive (App. Br. 14; McCullough, col. 1, ll. 24-26). This section of McCullough discusses asserted inferior properties associated with some random copolymers which were prior art to McCullough as compared to other prior art impact copolymers and does not establish that the combined teachings of the applied references, as employed by the Examiner, would not have suggested the claimed subject matter. Certainly, Appellants have not articulated why one of ordinary skill in the art would have been discouraged from following the teachings of Su in forming a polymer blend film with added clarifying agent to reduce haze, according to McCullough's teachings, based on the prior art section of McCullough referred to by Appellants.

Appellants seemingly argue that the "consisting essentially of" transitional phrase employed in representative claim 1 would preclude having a third copolymer as employed by Su in the core polymer blend by urging that "additional, inherently hazy material would impact the overall clarity of the blend ..." (App. Br. 14). However, Appellants have not substantiated this argument with any persuasive evidence, as indicated by the Examiner (Ans. 5).

On this record and after due consideration of the evidence and the respective contentions of Appellants and the Examiner, we determine that, on balance, the totality of the evidence and argument favors an obviousness determination with respect to the claimed subject matter.

ORDER

The Examiner's decision to reject claims 1, 3-9, 11-18, 20-24, and 26-34 under 35 U.S.C. § 103(a) as being unpatentable over Su in view of McCullough is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

kmm

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